IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929

WP(C).No. 31278 of 2005(W)

AGAINST THE ORDER IN IA.NO.854/2005 IN AS.44/2001 of I ADDL. DISTRICT COURT, PALAKKAD

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PETITIONERS:

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1. **K.SHAIK DAVOOD, S/O.KAJAHUSSAIN, RESIDING AT ROBINSON ROAD, KOPPAM AMSOM, PALAKKAD TALUK.**

2. **K.MUHAMMED RAFFI, S/O.KAJAHUSSAIN, RESIDING AT ROBINSON ROAD, KOPPAM AMSOM, PALAKKAD TALUK.**

3. **K.SIRAJ, S/O.KAJAHUSSAIN, RESIDING AT ROBINSON ROAD, KOPPAM AMSOM, PALAKKAD TALUK.**

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.M.HARISHARMA
SRI.T.P.ELDHOSE
SMT.O.K.SANTHA

RESPONDENTS:

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1. **SHAHUL HAMEED, RESIDING AT 11/625, COURT ROAD, KOPPAM AMSOM, PALAKKAD TALUK.**

2. **MUHAMMED RAFFI, S/O.LATE MUHAMMED ALI, RESIDING AT 11/625, COURT ROAD, KOPPAM AMSOM, PALAKKAD TALUK.**

3. **UMMUSALMA, S/O.LATE MUHAMMED ALI, W/O.ABDUL JABBAR, RESIDING AT MAYILOTHU KALAM, PALATHULLI AMSOM, PALAKKAD TALUK, PALAKKAD DISTRICT.**

4. LAILA NOOR MOHAMMED, D/O.MOHAMMED ALI,
   W/O.NOOR MOHAMMED, 4/23B, AUDITOR STREET
   MAIN ROAD, CHETTIPALAYAM, POTHANUR,
   COIMBATORE.

5. EBRAHIM, S/O.LATE MUHAMMED ALI,
   B 27, THRIVENI, CIVIL NAGAR, YAKKARA AMSOM,
   PALAKKAD TALUK.

6. NOUFAL, S/O.LATE MUHAMMED ALI,
   B27, THRIVENI, CIVIL NAGAR, YAKKARA AMSOM,
   PALAKKAD TALUK.

7. JOHANAR SARVUDEEN, S/O.LATE
   MOHAMMED ALI, NO.1, UMMER NAGAR,
   POTHANUR MAIN ROAD, COIMBATORE.

8. FAIZER, W/O.JAFARALI AND D/O.
   LATE MOHAMMED ALI, 21/766, ASHIK MANZIL,
   SREENIVASA GARDEN, KALLIKKAD, PIRAYIRI AMSOM,
   PALAKKAD TALUK.

9. MOHAMMED SALIM, S/O.LATE
   MOHAMMED ALI, AYILAM COTTAGE, A.R.NAIR COLONY,
   KUNNATHURMEDU, KANNANUR AMSOM, PALAKKAD TALUK.

10. SAMEENA, W/O.SALIM & D/O.LATE
    MOHAMMED ALI, RESIDING AT A.R.NAIR COLONY,
    KUNNANNUR AMSOM, PALAKKAD TALUK.

R3 & R10 BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.P.B.KRISHNAN
R4 & R7 BY ADV. SRI.K.JAYAKUMAR
SRI.HARISH R. MENON

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26/07/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

WPC.NO.31278/2005 W

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF STATEMENT DTD. 14/09/2004 FILED BY THE ADV.R.MANIKANTAN, BEFORE THE FIRST ADDL.DISTRICT COURT, PALAKKAD IN A.S.NO.44/2001.**

EXT.P2: **COPY OF I.A.NO.1770/04 IN A.S.44/2001 DTD. 15/10/2004 ON THE FILE OF THE DISTRICT COURT, PALAKKAD.**

EXT.P3: **COPY OF JUDGMENT DTD. 9/03/2005 N A.S.NO.44/2001 ON THE FILE OF THE DISTRICT COURT, PALAKKAD.**

EXT.P4: **COPY OF I.A.NO.854/2005 IN A.S.44/2001 DTD.16/05/2005 ON THE FILE OF THE DISTRICT COURT, PALAKKAD.**

EXT.P4(A): **CIOPY OF AFFIDAVIT DTD. 16/05/05 FILED IN SUPPORT OF EXT.P4.**

EXT.P5: **COPY OF I.A.NO.880/2005 IN A.S.44/2001 DTD. 15/05/2005 ON THE FILE OF THE DISTRICT COURT, PALAKKAD.**

EXT.P5(A): **COPY OF AFFIDAVIT DTD. 15/05/05 FILED IN SUPPORT OF EXT.P5.**

EXT.P6: **COPY OF I.A.NO.881/2005 IN A.S.44/2001 DTD. 16/05/2005 ON THE FILE OF THE DISTRICT COURT, PALAKKAD.**

EXT.P6(A): **COPY OF AFFIDAVIT DTD. 16/05/05 FILED IN SUPPORT OF EXT.P6.**

EXT.P7: **COPY OF ORDER DTD. 9/08/2005 IN I.A.NOS.854, 880 & 881/2005 IN A.S.44/01 ON THE FILE OF THE DISTRICT COURT, PALAKKAD.**

/TRUE COPY/

P.A.TO JUDGE

KSS

PIUS C. KURIAKOSE, J.

C.R.P. NO.1115/2005 & W.P.(C) NO. 31278 of 2005

Dated this the 26th day of July , 2007

JUDGMENT

The plaintiffs in a suit for declaration regrading the right of passage over a pathway scheduled to the plaint and consequential injunction are the petitioners in W.P.(C) No. 31278/2005 and they seek quashment of Ext.P7 common order passed by the District Judge in an appeal suit which had been filed against the judgment and decree setting aside ex-parte judgment and decree which had been passed in the appeal. The petitioners before the District Court were respondents 4 to 10 in the appeal. The petitioners submit that pending appeal, one of the respondents died. The deceased respondents and one of his legal representatives were already in the array of parties in the suit as defendants 1 and 3. In the suit they had filed a joint written statement raising common contentions. When it was noticed that the first defendant is no more, an application was

filed by the plaintiffs/petitioners calling upon the 3rd defendant to furnish the names and addresses of the legal heirs of the deceased defendant. He filed a statement as Ext.P1 disclosing the names and address of the legal heirs of the deceased first defendant. On the basis of Ext.P1, an application for impleadment was filed by the petitioners and they submit that after notice thereof, the application was allowed and subsequently the appeal was finally heard and decided as per Ext.P3. Nobody preferred any second appeal against Ext.P3. It is thereafter that Exts.P4 to P6 applications for setting aside Ext.P3 on the premise that Ext.P3 was an ex – parte decision were filed.

2. The grievance of the petitioners is that though the learned District Judge had himself found that most of the grounds raised in Exts.P4 to P6 applications were unsustainable, the learned Judge ultimately set aside Ext.P3 by passing Ext.P7 essentially on the ground that it was notice on the impleadment application alone which had been served on the defendants and not that notice on the appeal and on the ground that at least in the case of one of the legal heirs of the deceased first defendant

by name Nouphal concededly there was no service on notice on him even regarding the impleadment application.

3. C.R.P.No.1115/2005 is filed by the very same petitioners impugning very same common order out of some confusion as to the remedy correctly available against the said order.

4. Sri.D.Krishna Prasad, the learned counsel for the petitioners and Sri.P.B.Krishnan, the learned counsel for the contesting respondents addressed me elaborately. Flaying Ext.P7, Sri.P.B.Krishnan, would submit that in the suit, defendants 1 and 3 who were mother and son alone were contesting, it was a common contest which was raised by those two defendants. When the first defendant mother died one of the legal heirs was none other than the 3rd defendant Sri.Muhammed Raffi, the 3rd respondent in the appeal and the 2nd respondent in the writ petition. The 2nd respondent had admittedly contested the matter and he had been heard in the apeal before passing Ext.P3 judgment. Upon the death of the first defendant, Aysha Mariam who was the first respondent in the appeal as per order passed by the court in I.A.No.1635/2004

Ext.P1 statement was filed for directing the 2nd respondent to disclose the names and address of the legal heirs of the deceased Aysha Mariam. It was on the basis of Ext.P1 that Ext.P2 impleadment application was filed. Despite the receipt of notice on Ext.P2 application, the respondent did not appear and contest. Accordingly, they were brought on record. Counsel submitted that the additional respondents, at any rate, could not have raised the contention that they have not received notice of the appeal. Service of application to implead them as parties in the appeal was enough notice regrading the pendnecy of the appeal and therefore Exts.P4 to P6 applications for setting aside Ext.P3 was not maintainable. There was no order of the court also to take out notice separately on the appeal memorandum to the additionally impleaded parties. In fact no request in that regard was made by the additionally impleaded parities and much less by the 2nd respondent. The entire estate of the deceased first respondent was adequately represented including the interest of those legal heirs who now complained that they had no notice. It is not the requirement of law that separate summons should be issued in the appeal to the respondent who

is impeldaed as additional party in the appeal.

5. Sri. D.Krishna Prasad would fortify his submissions by several judicial precedents. Judgment of the Supreme Court in **Daya Ram and others v. ShvamSundari and others** (AIR 1965 Supreme Court 1049), **N.K.Mohd. Sulaiman Sahib v. N.C.Mohd. Ismail Saheb and others** (AIR 1966 Supreme Court 792), **Beharilal and another v. Smt.Bhuri Devi and others** (AIR 1997 Supreme Court 1879) were among the decisions cited by Sri.D.Krishna Prasad. The submissions of Sri.D.Krishna Prasad were very stiffly by Sri.P.B.Krishnan.

Having considered the rival submissions addressed at the Bar in the light of the judicial precedents which were cited and having guaged the impugned orders by the parameters which are applicable for exercise of jurisdiction by this court under the revisional jurisdiction under Section 115 CPC and under the supervisory jurisdiction under Article 227 of the Constitution, I am of the view that the impugned orders can be sustained, but, clarifying that the contesting respondents in the appeal will be entitled only for a hearing in the appeal.

Hence, sustaining the impugned orders, learned District

Judge is directed to conduct a hearing at the earliest and at any rate within one month of production of a copy of this judgment and deliver judgment within another two weeks of hearing. Further notice need not be sent to the contesting respondents. The parties will appear before the District Court on 16/03/2008.

PIUS.C.KURIAKOSE
JUDGE

dpk/sv.

PIUS C. KURIAKOSE,
JUDGE.

dpk